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No. 723

IN THE

Supreme Court of the United States

OCTOBER TERM 1958

DAVID DAVIES, INC.,

Petitioner,

vs.

MAYNARD E. SENSENBRENNER, ETC., ET AL.,

Respondents.

REPLY BRIEF FOR PETITIONER

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In its brief herein at page 3, respondent claims that the petition herein should be denied because the Ohio courts found that the City of Columbus, Ohio did not receive the payments made by plaintiff for meat inspection fees and that, accordingly petitioner could not recover from this respondent; on the basis of this respondent claims the case was decided on a non-federal ground.

It is correct that the trial court made such a finding. We hasten to point out, however, that the trial court's decision and judgment was based upon a totally different ground, namely a determination that petitioner herein could not recover because it could not restore the respondent, City of Columbus and the Board of Health to status quo. The trial court then went on to add as a tail to its kite the finding that the City of Columbus had not received the money.

The Court of Appeals merely adopted the reasoning and finding of the trial court in affirming its decision. Accordingly, here too then the alleged non-federal ground was again a tail on the kite of the real ground for determination of the case. The appeal as of right in the Ohio Supreme Court, of course, was dismissed with no opinion and on finding that there was no debatable constitutional question.

This appeal, of course, is from the decision of the Supreme Court of Ohio, in which it found that there was no debatable constitutional question. That determination had nothing to do with any finding as to whether or not respondent had actually received the payments in question from petitioner. It was based solely and entirely on the question of whether or not petitioner's constitutional rights had been invaded. This petition for writ of certiorari is from that determination of the Supreme Court of Ohio. We accordingly submit that there is no question of determination of the case on a non-federal ground by the Supreme Court of Ohio.

Even if there is a possibility that this case could have been or was decided on a non-federal ground, it is a basic rule of the Supreme Court of the United States that it will examine the non-federal ground in order to find if such ground is fair and substantial. If this court finds that the ground is not fair and substantial but that it is so clearly ill-found that it cannot sustain the judgment or is frivolous, then this court will take jurisdiction of the case. A concise exposition of this determination which has been made in many cases by this court is found in *Postal Telegraph Cable Co. v. Newport*, 247 U. S. 464, as follows:

> Page 475: "Res judicata, like other kinds of estoppel, ordinarily is a matter of state law and as the

decision of the state court in this case in effect rests upon that ground, this of itself would be sufficient to sustain the judgment against reversal in this court except for two queries that must first be answered: (a) Is the question of state law, in this case, independent of the federal questions? and (b) is the decision reached upon the point sufficiently well founded to furnish adequate support for the judgment? Eustis v. Bolles, 150 U. S. 361; Southern Pacific Co. v. Schuyler 227 U. S. 601; Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U. S. 157.

"Waiving the doubt whether under the particular facts of this case, the question of res judicata can be regarded as independent of the federal questions that were raised, we are of the opinion *that the decision reached upon it is so clearly ill founded that it cannot sustain the judgment;*

Again, in *Konigsberg v. State Bar of California*, 353 U. S. 252, we find the following statement:

2. "The evidence in the record does not rationally support the only two grounds upon which the Committee relied in rejecting petitioner's application and therefore the State's refusal to admit him to the bar was a denial of due process and equal protection of the laws in violation of the Fourteenth Amendment."

An examination of the facts in the instant case will reveal that the trial court and the appellate court have absolutely no basis upon which to make the determination that the payments in question were not made to the City of Columbus.

All of the inspection fee payments were made to the treasurer of the City of Columbus. (Sections 8 and 11 of agreed statement of fact). At the same time that the Board of Health regulation assessing inspection fees was passed, the council of the City of Columbus passed Ordinance No. 20447 (Exhibit "E"), titled "To establish a meat inspection fund". Section 1 of that ordinance pro-

vided that all meat inspection charges paid into the city treasury should be credited to a separate fund, known as "Meat inspection fund". Section 2 of that ordinance provided that the city auditor be authorized and directed to establish a special fund pursuant to G. C. 5625-11 (R. C. 5705.12). An examination of that section of the General Code reveals that it applies only to funds established by municipalities.

Shortly after the passage of this first ordinance, the Columbus city council passed an appropriation ordinance, making an appropriation of the monies in the meat inspection fund set up in the previous ordinance . .

Then in January of 1948 (the year following the institution of the inspection fee), the Columbus city council passed Ordinance 2-48 (Exhibit "G"), which provides as follows:

> Section 3. "On and after January 1, 1948 all funds received from the issuance of birth and health certificates, together with fees received from milk inspections; *meat inspections* and food inspections *are to be paid into the City Treasury* for the credit of the fund for general purposes, otherwise known as the 'General Fund' for the purpose of providing funds with which to pay the appropriations to be made as provided in Section 2 hereof." (Emphasis ours)

In Section 2 this ordinance provided that each year in the annual appropriation ordinance of the city, funds should be appropriated to each of the divisions involved, including the meat inspection division. This ordinance was in effect throughout the balance of the duration of the inspection fee payments and accordingly each year an appropriation was made as provided in this ordinance. It should be emphasized that this Ordinance 2-48 provided that the payments of meat inspection fees were to be placed in the general fund of the city; that fund into which all revenues

of the city are paid. Basically, therefore, from the first of January 1948 on, all meat inspection fees paid by the appellant herein went into the common pot from which all expenses of the City of Columbus were paid. Those payments lost their identity in the general fund and thereafter the expenses of the Board of Health were paid from a meat inspection fund appropriated by the city council from the general fund and handled in exactly the same way as every other fund of the City of Columbus.

In summary, therefore, the payments here involved were made to the Columbus city treasurer and the City of Columbus took jurisdiction of these payments, placed them in funds established by action of its city council, and disbursed them accordingly. In other words, these monies were received, handled and disbursed in exactly the same fashion as were all other revenues received by the City of Columbus. The city exercised complete dominion over them.

The defendant, moreover, in its answer conceded that the monies here in question were paid to and received by the City of Columbus. Thus, at page 2 of the answer, in the second defense, the defendant acknowledges the validity of its actions in handling the money in the following language:

> "And that the Council of the City of Columbus, Ohio on the 21st day of April, 1947, *acting within its just legislative powers and rights* duly passed ordinance No. 204-47 providing for disposition of fees collected for meat inspection performed under the authority of said Board of Health of the City of Columbus . . . ." (Emphasis ours)

By the like reasoning, therefore, the following ordinance, 248, would have the same seal of validity.

Further allegations in defendant's answer serve to solidify its acknowledgment that the money was received, held and used by the City of Columbus. Thus, at page 3 in the third defense we find the following language:

> "That the *defendants* made assessments and *collected* certain sums of money from the plaintiff for and on the basis of the said meat inspection services." (Emphasis ours)

Originally in this action the City of Columbus and the Board of Health were joint defendants. Obviously, if it had been intended to claim that the defendant, City of Columbus, had not collected the money here involved, this allegation would not have been so written. It would have specified that the defendant, Board of Health, assessed and collected. Under the fact situation in this case, the Board of Health was making the assessments and not the City of Columbus. Obviously, therefore, the phrase "made assessments" could apply only to the Board of Health. The money was collected by the City of Columbus and therefore that word must apply to the City of Columbus. Accordingly, the defendant is again admitting that the city collected and received the money. Finally, there was not one word in the agreed statement of facts to even indicate that the payments were made to the Board of Health.

The following language in the fourth defense on page 3 of defendant's answer is as follows:

> "And that the monies so collected from plaintiff have been disbursed by the defendants . . ."

Again, if the city had intended to claim that the money was solely handled and disbursed by the Board of Health, the answer would have said so. To the contrary, it uses the word "defendants" which, of course, included the City

of Columbus, and there admits that the city had a part in the disbursement. Obviously, the city could make no disbursement if it never had the money. Furthermore, if the City of Columbus had intended to deny that it had received the money, that is a defense which should have been affirmatively pleaded. To the contrary, there was no such language. We might add, that nowhere in the city's brief in the trial court was any claim that The City of Columbus did not receive the funds here involved. Obviously, on the basis of the facts of the case as set forth above, the city could not so claim.

In the face of the foregoing undisputed facts, the trial court and Court of Appeals chose to completely ignore them and upon the basis of a tortured interpretation of the law of Ohio find that the treasurer of the City of Columbus was acting as treasurer for the Board of Health, under authority of G. C. 1261-3 (R. C. 3709.31) and therefore received the inspection fee payments into a health fund held for the Board of Health. It apparently mattered not to these courts that there was not one word in the agreed statement of fact of the existence of any such health fund and no allegation in the pleadings of any such health fund. Obviously, there could not have been, because there never was in existence a separate health fund of the Board of Health. The health fund thus was solely a fictitious legal figment manufactured by these courts to substantiate their argument.

We submit therefore that any determination by the trial court and the Court of Appeals, finding that the City of Columbus did not receive the money paid for inspection fees, was without foundation either in fact or in law. It could not sustain the judgment against petitioner. Accordingly, if this court chooses to go beyond the refusal of the

Ohio Supreme Court to entertain petitioner's appeal on constitutional grounds, there is no fair and substantial non-federal ground upon which this case was or could be decided.

Respectfully submitted,

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